

Portsmouth HealthCare NHS Trust  
**MEMORANDUM**

From

Lorna Green

Ref

To

See below

cc

17 May 2001

**Corporate Manslaughter**

Following our discussions a couple of weeks ago on the GWMH police case and the issue of corporate manslaughter, I thought you might find the attached interesting.

The present state of the law makes it very difficult to achieve a successful prosecution for the offence of corporate manslaughter and, therefore the Government is seeking to reform the law. However, until changes are made the risk of a successful prosecution relating to the case in which the Trust has an interest would appear to be negligible.

I hope you find this helpful.

**Code A**

Lorna

Max Millett

Ian Reid

David Jarrett

Lesley Humphrey ✓

decrease individual liability. It will merely provide a different basis of criminal liability for corporations.

3.1.3 The governing principle in English law on the criminal liability of companies is that those who control or manage the affairs of the company are regarded as embodying the company itself. Before a company can be convicted of manslaughter, an individual who can be "identified as the embodiment of the company itself" must first be shown himself to have been guilty of manslaughter. Only if the individual who is the embodiment of the company is found guilty can the company be convicted. Where there is insufficient evidence to convict the individual, any prosecution of the company must fail. This principle is often referred to as the "identification" doctrine.

3.1.4 There can often be great difficulty in identifying an individual who is the embodiment of the company and *who is culpable*. The problem becomes greater with larger companies which may have a more diffuse structure, where overall responsibility for safety matters in a company can be unclear and no one individual may have that responsibility. In such circumstances it may be impossible to identify specific individuals who may be properly regarded as representing the directing mind of the company and who also possess the requisite *mens rea* (mental state) to be guilty of manslaughter: in such circumstances, no criminal liability can be attributed to the company itself.

### The need for reform

3.1.5 There have been a number of disasters in recent years which have evoked demands for the use of the law of manslaughter and failures to successfully prosecute have led to an apparent perception among the public that the law dealing with corporate manslaughter is inadequate. This perception has been heightened because the disasters have been followed by inquiries which have found corporate bodies at fault and meriting very serious criticism and in some instances there have been successful prosecutions for offences under the Health and Safety at Work Etc Act 1974, as amended ("the 1974 Act")<sup>4</sup>. These disasters have included:

- The Herald of Free Enterprise disaster on 6 March 1987 where the jury at the inquest returned verdicts of unlawful killing in 187 cases and the DPP launched prosecutions against 7 individuals and the company. The case failed because the various acts of negligence could not be aggregated and attributed to any individual who was a directing mind.
- The King's Cross fire on 18 November 1987 which claimed 31 lives. London Underground were criticised for not guarding against the unpredictability of the fire and because no one person was charged with overall responsibility.
- The Clapham rail crash on 12 December 1988 which caused 35 deaths and nearly 500 injuries. British Rail were criticised for allowing working practices which were "positively dangerous" and it was said that the errors went much wider and higher in the organisation than merely to be the responsibility of those who were working that day.
- The Southall rail crash on 19 September 1997 which resulted in 7 deaths and 151 injuries. In July 1999 Great Western Trains (GWT) pleaded guilty to contravening Section 3(1) of the 1974 Act in that they failed to ensure that the public were not exposed to risks to their health and safety. They received a record fine for a health and safety offence of £1.5 million for what Mr Justice Scott-Baker described as "a serious fault of senior management". The judge had earlier ruled that a charge of manslaughter could not succeed because of the need to identify some person whose gross negligence was that of GWT itself.<sup>5</sup>

<sup>4</sup> The low numbers of manslaughter cases in relation to deaths at work brought before the courts do not reflect any unwillingness on the part of the health and safety enforcing authorities to refer such cases to the CPS and the police, but result principally from shortcomings in the existing law on corporate manslaughter. From April 1992 to March 1998, 59 cases investigated by HSE were referred to the CPS for possible manslaughter charges. The CPS felt able to prosecute in only 18 cases and only 4 during that time were successful (most of these did not concern corporations).

<sup>5</sup> The Attorney General's appeal to the Court of Appeal on this aspect of the case was rejected on 15 February 2000 (Attorney General's Reference no 2/1999)

3.1.6 It is not only the law's apparent inability to hold accountable companies responsible for large

scale disasters which led the Law Commission to propose that the law be reformed. The result of the operation of the identification doctrine has meant that there have been only a few<sup>6</sup> prosecutions of a corporation for manslaughter in the history of English law and only three successful prosecutions - OLL Ltd, Jackson Transport (Ossett) Ltd and Roy Bowles Transport Ltd - and all of these were small companies.<sup>7</sup>

3.1.7 The Law Commission also considered that there were many cases of deaths in factories and building sites where death could and should have been avoided. Furthermore, in response to the Law Commission's Consultation Paper No. 135 on involuntary manslaughter, the Health and Safety Executive (HSE) commented that death or personal injury resulting from a major disaster is rarely due to the negligence of a single individual. In the majority of such cases the disaster is caused as a result of the failure of systems controlling the risk with the carelessness of individuals being a contributing factor.

<sup>6</sup> Including *Cory Bros Ltd* [1927] 1 KB 810; *Northern Shipping Mining Construction Ltd*, *The Times*, 2,4 and 5 February 1965; *P & O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72 (Central Criminal Court); *Kite and OLL Ltd*, *Winchester Crown Court*, 8 December 1994, reported in *The Independent*, 9 December 1994; *R v Jackson Transport (Ossett) Ltd* reported in *Health and Safety at Work*, November 1996, p.4; *R v Great Western Trains Company (GWT)*, *Central Criminal Court*, 30 June 1999; *Roy Bowles Transport Ltd*, *The Times*, 11 December 1999.

<sup>7</sup> Following the House of Lords decision in *R v Adomako* [1995] 1AC 17, the Court of Appeal ruled on 15 February 2000 in *Attorney General's Reference No 2/1999* that a defendant can be convicted of gross negligence manslaughter without evidence of his state of mind. However, the Court also ruled that the guilt of a human individual had first to be established before a non-human could be convicted.

### The Law Commission's proposals

3.1.8 The Law Commission considered that it would benefit both companies and the enforcement authorities, if companies were to take health and safety issues more seriously. The Commission considered a number of approaches for extending corporate liability but concluded by recommending that:

1. There should be a special offence of corporate killing, broadly corresponding to the proposed offence of killing by gross carelessness.
2. The corporate offence should (like the individual offence) be committed only where the corporation's conduct in causing death fell far below what could reasonably be expected.
3. The corporate offence should not (unlike the individual offence) require that the risk be obvious or that the defendant be capable of appreciating the risk.
4. A death should be regarded as having been caused by the conduct of the corporation if it is caused by a "management failure", so that the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or affected by its activities.
5. Such a failure will be regarded as a cause of a person's death even if the immediate cause is the act or omission of an individual.
6. That individuals within a company could still be liable for the offences of reckless killing and killing by gross carelessness as well as the company being liable for the offence of corporate killing.

3.1.9 The Government considers that while there may prove to be difficulties in proving a "management failure" there is a need to restore public confidence that companies responsible for loss of life can properly be held accountable in law. The Government believes the creation of a new offence of corporate killing would give useful emphasis to the seriousness of health and safety offences and would give force to the need to consider health and safety as a management issue.

**The Government therefore accepts the Law Commission's proposal for a new offence of corporate killing, subject to what is said below.**

### 3.2. Potential Defendants

#### Corporations